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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 269

LESTER GUNN, ET AL.,
Appellants

Vs.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.
Appellees

On Direct Appeal From the United States District Court
Western District of Texas
Waco Division

APPELLANTS' BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A.

This is an appeal from the Opinion and Judgment of the United States District Court for the Western District of Texas, Waco Division, sitting as a Three Judge Federal Court in Cause No. 67-63-W on the docket of said court, same being not yet reported. A copy of the original opinion and a copy of the addendum opinion issued following the overruling of motion for new trial are contained in the Single Appendix.

B.

The Trial Court issued its original opinion on April 10, 1968. The order denying motion for new trial was entered April 30, 1968. Notice of appeal was filed on

May 6, 1968. The Trial Court issued its "Addendum on Motion for New Trial" on May 31, 1968. Appellant filed a Jurisdictional Statement on July 3, 1968, invoking 28 U.S.C. §1253 as grounds for the appeal. This Court noted jurisdiction on October 14, 1968.

C.

1. The United States Constitutional provisions involved are the First Amendment thereto, to-wit:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

and Section I of the Fourteenth Amendment thereto, to-wit:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Texas Statute involved is Article 474 of the Penal Code of Texas which may be found in Volume 1 of Vernon's Penal Code of the State of Texas, at page 491, and states as follows:

> Whoever shall go into or near any public place or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely dis-

play any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200.).

D.

The following questions are presented by this appeal:

1. Did the Trial Court err in failing to grant Defendant's motion to dismiss?

2. Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

3. Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of overbreadth?

4. Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 28 U.S.C., Section 2284(2)?

E.

On December 12, 1967, the President of the United States was scheduled to make an inspection of Fort Hood, a United States Army installation located near Killeen, Texas. Killeen is a community of some 30,000 population and is located in Bell County which contains two larger cities, Belton (the county seat) and Temple (the largest city).

On December 11, 1967, area news media released the announcement that the President would make a speech at the dedicatory program of Central Texas College, a new institution located on a portion of the land com-

prising the Fort Hood military reservation. From the surrounding area and from among the nearly 70,000 soldiers and their dependents at Fort Hood a crowd of approximately 25,000 gathered to hear the President's address. (App. p. 36.)

The Secret Service Agents responsible for safeguarding the President had requested assistance from the Sheriff of Bell County, the Sheriff of Coryell County (adjoining Bell County and containing a portion of the Fort Hood reservation), the Chief of Police of Killeen and the Provost-Marshall of Fort Hood. Some personnel from each of these offices were present in response to such request. (App. p. 71.)

The University Committee to End the War in Viet Nam is an unincorporated voluntary association mostly composed of people who are residents of Austin, Texas, and its environs. Their purpose is to protest the conduct of the war in Viet Nam. Austin is located some 67 miles by road from Killeen. When some committee members learned of the President's speech on the morning of December 12, they hastily gathered a group of several carloads of committee members and sympathizers to drive to Killeen to hear the speech and to express their views to the assembled crowd by placards or other means available to them. They arrived after the President had begun talking.

After choosing their placards they proceeded towards the speaking. There were many uniformed service personnel present including a number of returned Viet Nam war veterans. (App. p. 37.) an air of hostility developed promptly but the protestors decided to push on. (App. p. 37.) (App. p. 83.) The court below specifically declined to rule on whether or not they should have realized that their continued approach might cause a disturbance or even violence. (App. p. 83.)

Several uniformed soldiers attacked the group of protestors and tore up their signs. (App. p. 37.) Also some of the protestors were roughed up, although no serious injury was inflicted (perhaps because of the prompt intervention by military police standing nearby). (App. p. 71.) The military police arrested the three named plaintiffs. (App. p. 37.)

Lester Gunn, Sheriff of Bell County, and Sheriff Cummings, of Coryell County, were standing near the speakers platform when a Killeen policeman ran by, telling them there was a disturbance over on the edge of the crowd. These two officers went immediately to the scene and found that the three men had already been arrested by the military police and taken away to Copperas Cove (in Coryell County). Later, it was decided that the disturbance had been in Bell County and by radio Sheriff Gunn authorized his deputy to file disturbance charges against the three. After arrival at the Bell County jail the three men were allowed to use the telephone and in about an hour an attorney arrived and made their bond. (App. p. 71.)

There is no indication of what disciplinary action may have been taken towards the soldiers involved in the disturbance.

On December 19, 1967, the instant case was filed and a temporary restraining order granted prohibiting the prosecution of the charges against the three men. On February 13, 1968, the charges against the three men were dismissed on the grounds that the disturbance occurred on a federal enclave on which jurisdiction of criminal matters had been ceded to the Federal Government and thus the Justice of the Peace Court was without jurisdiction. (App. pp. 16-24.)

On February 14, 1968, the Defendants filed a motion to dismiss on the grounds that all questions had become

moot with the disappearance of the criminal charges and that there was no longer any controversy before the court. (App. p. 16.)

The Three-Judge Court carried the motion to dismiss along with the merits of the case and heard everything simultaneously on February 23, 1968. At no time was any notice given to the Governor of Texas that this hearing was to be held or of the subject matter that purportedly formed the basis for a controversy.

After the hearing, the court ruled that Article 474 was unconstitutional on its face. The opinion discusses only the use of "loud and vociferous language." But the holding is not limited to this portion. The court below simply stated that:

> "We reach the conclusion that Article 474 is impermissably and unconstitutionally broad."

and then went on to stay their mandate until the next session of the legislature to permit the enactment of "such disturbing-the-peace statute as will meet constitutional requirements."* The court overruled the the Motion to Dismiss. (App. p. 81.)

Defendant then filed a motion for new trial with particular emphasis on State Court constructions of Article 474. The Trial Court overruled the motion for new trial but subsequently issued its "Addendum on Motion for New Trial. (App. p. 108.) From all of this Defendant (Appellant hereafter) appeals.

F.

As to each of the points raised on appeal, Appellant

*The Texas Legislature has met and adjourned since the opinion was issued and took no action to amend Art. 474 or any other penal statute in the "disturbing-the-peace" field.

here re-states these points with a summary of argument for each point.

POINT 1 RESTATED

Did the Trial Court err in failing to grant Defendant's motion to dismiss?

Appellant urges that the dismissal of State criminal charges in the Justice of the Peace Court on a proper legal basis left the U. S. District Court with no "controversy" (in the absence of some affirmative showing of a contemplated, continuing course of abusive conduct) so that any action by the U. S. District Court thereafter was merely an "advisory opinion" and thus beyond its powers.

POINT 2 RESTATED

Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

Appellants urge that Article 474 does not infringe upon the right of anyone to express his ideas (whether such ideas be popular or unpopular) but on the contrary that the sole purpose of Article 474 is to establish certain standards of *prohibited conduct,* violations of which are inimical to an orderly society and the enforcement of which is necessary to "insure domestic tranquility." Appellant urges that the terms used in Article 474 are clear and understandable to all.

POINT 3 RESTATED

Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of overbreadth?

Appellant urges that under applicable decisions of this and inferior Federal Courts, the Trial Court in the

instant cause is legally required to accept the constructions and definitions promulgated by Texas Courts in passing on Texas statutes. Since Texas decisions make it clear that violations of Article 474 are measured in terms of *conduct* not the *ideas expressed,* the Trial Court should have limited their considerations in like manner.

POINT 4 RESTATED

Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 28 U.S.C., Section 2284(2)?

Appellant urges quite simply that this is a jurisdictional matter based primarily on comity between sovereigns.

G.

ARGUMENT

POINT 1 RESTATED

Did the Trial Court err in failing to grant Defendant's motion to dismiss?

This Court has long recognized that there must be an actual controversy before a Federal Court before jurisdiction attached for the holding of a hearing. Appellee sought a declaratory judgment in the instant case under the provisions of Title 28, U.S.C.A., § 2201 which provides, *inter alia* ". . . in a case of actual controversy within its jurisdiction . . ." In view of the facts in this case—the arrest by the U.S. Military Police, the prompt release of those arrested on bond and the subsequent dismissal of the criminal charges in the Justice of the Peace Court (which criminal charges formed the basic subject matter of Appellees

Original Complaint)—no "actual controversy" existed at any time following such dismissal.

In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, decided March 26, 1962, the Supreme Court recognized the principle at 369 U.S. 204 that:

> "A federal court cannot 'pronounce any statute, either of a state or of the United States void, because irreconciable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N.Y. & P. Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899."

In *Cargill, Incorporated v. United States,* 188 F.Sup. 386, the plaintiff was complaining that certain actions by an agency of the United States government were invasions of his constitutional rights. The question was raised before the three judge federal court that:

> ". . . and that the Commission will probably enter a final order of dismissal to make the matter 'moot' before this Court can hear and decide the issues and that such practice, too, has been followed in the past and is continuing to plaintiffs' damage."

In disposing of the matter, the Court said:

> "It is the duty of this Court to 'decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293. This principle was recently restated by the Supreme Court in the case of Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri, 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed. 2d 373." . . .

" 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.' Amalgamated Ass'n. etc. v. Wisconsin Emp. Rel. Bd., 340 U.S. 416, 418, 71 S.Ct. 373, 375, 95 L.Ed. 389. The very proposition here was involved in two recent decisions wherein the Supreme Court of the United States remanded three-judge court opinions with directions to dismiss for mootness. See Dixie Carriers, Inc., v. U.S., D.C., 143 F.Supp. 844; Atchison, T & S.F.R. Co. v. Dixie Carriers, Inc., 355 U.S. 179, 78 S. Ct. 258, 2 L.Ed. 2d 186, and Amarillo-Borger Express v. United States, D.C. 138 F.Supp. 411; Id., 352 U.S. 1028, 77 S.Ct. 594, 1 L.Ed.2d 598.

"The same reasoning applies to the prayer for declaratory judgment relief. Section 2201, Title 28 U.S.C., creates a remedy 'In a case of actual controvery within its jurisdiction, * * *' "

See also *Griese v. Combs,* 183 F.Supp. 705; *Continental Nut Company v. Benson,* 166 F.Supp. 142; *Audiocasting, Inc. v. State of Louisiana,* 143 F.Supp. 922.

In the Trial Court's Opinion overruling the Motion to Dismiss, the Trial Court relied heavily on *Dombrowski v. Pfister,* 380 U.S. 479 and *Zwickler v. Koota,* 389 U.S. 241. Appellants have urged throughout the entire proceedings and urge now to this court that *Dombrowski* and *Zwickler* are not applicable. Nowhere in the record is there a showing of a course of conduct by Appellants (or by any enforcement officials of the State of Texas or any of its subdivisions) whereby any of Appellees (or any other person or group similarly situated) was threatened with or subjected to systematic enforcement of Article 474 to prohibit free expression (or for any purpose). In fact, the record reflects that the arrests which gave rise to this case were made by federal military police, and not state or coun-

ty officers, following an altercation. The arrests were not as a result of anything said by appellees, but were based solely on their conduct.

Absent threat of future arrest and absent a showing of a concerted plan to harass Appellees by state officers, Appellants urge that the instant case should be governed by the rationale and holding expressed by this court in *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 683 (1968).

And in relying on *Cameron,* Appellants point out the definition appearing in the dissenting opinion written by Mr. Justice Fortas which states:

> "I agree that the statute in question is not 'unconstitutional on its face.' But that conclusion is not the end of the matter. *Dombrowski* stands for the proposition that 'the abstention doctrine . . . is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression, *or as applied for the purpose of discouraging protected activities.*' 380 U.S., at 489-490. (Emphasis added.)
>
> *Dombrowski* establishes that the federal courts will grant relief when 'defense of the state's criminal prosecution will not assure adequate vindication' of First Amendment rights. 380 U.S., at 485. According to *Dombrowski,* this condition exists when the State has invoked the criminal law in bad faith and for the purpose of harassing and disrupting the exercise of those rights. Federal courts are available to enjoin the invocation of state criminal process when that process is abusively invoked 'without any hope of ultimate success, but only to discourage' the assertion of constitutionally protected rights. 380 U.S., at 490. See also *City of Greenwood v. Peacock,* 384 U.S. 808, 829 (1966).
>
> *Dombrowski* is strong medicine. It involves interposition of federal power at the threshold stage

of the administration of state criminal laws. *Dombrowski's* remedy is justified only when First Amendment rights, which are basic to our freedom, are imperiled by calculated, deliberate state assault. And those who seek federal intervention bear a heavy burden to show that the State, in prosecuting them, is not engaged in use of its police power for legitimate ends, but is deliberately invoking it to harass or suppress First Amendment rights. *Dombrowski* should never be invoked when the State is, in substance and truth, engaged in the enforcement of valid criminal laws. Ordinarily, the presumption that the State's motive was law enforcement and not interference with speech or assembly will carry the day.

The dissent then goes on to describe the course of action which Mr. Justice Fortas feels would bring *Dombrowski, supra;* into play. There is no such course of action, actual or threatened, in the instant record.

See also *Zwicker v. Boll,* 270 F.Supp. 131, aff. 391 U.S. 353.

Appellants earnestly urge that the Trial Court erred in failing to grant the Motion to Dismiss.

POINT 2 RESTATED

Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

The Opinion and Judgment of the Trial Court is not clear as to whether Article 474 is unconstitutional in whole or in part. This arises from the fact that the court below limited its discussion at one point to "loud and vociferous language."

The conclusion in the order makes it appear that Article 474 in its entirety has been ruled unconstitutional by the Trial Court. We do not believe that such

a result was intended. This discussion consequently, like that of the Trial Court's Order, will be largely limited to the phrase "loud and vociferous language" and the phrase "in a manner calculated to disturb the person or persons present at such place or house."

In its Opinion and Order, the Trial Court specifically eliminated the question of the constitutionality of the application of Article 474 and with equal specificity limited its concern to the determination of whether the statute was constitutionally defective on its face as being overly broad.

Examination of previous decisions of this court involving vagueness and overbreadth in First Amendment areas shows that they turn on a common rationalizing principle. A statute is unconstitutional overbroad if it allows a speaker to be punished because those in authority do not like the ideas he has expressed. The statute is valid, even though its terms are general and imprecise, if its application is not dependent on the content of the speech. In this connection we direct the attention of this court to Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67 (1960) cited on several occasions by this court.

The leading example of a case in which state laws was held unconstitutionally overbroad and indefinite is *Edwards v. South Carolina,* 372 U.S. 229 (1963). In that case there was not even a statute involved. Defendants were prosecuted for the common-law crime of breach of the peace, and the state court had said that this offense was "not susceptible of exact definition." The state court gave the offense a broad construction, and this could not stand. The same vice was present in *Cox v. Louisiana* 379 U.S. 536 (1965). There it was a statute, rather than a common-law crime, that

was involved, but the statute had been construed by the state court in the same fashion as had the common-law crime in *Edwards.*

> "The Louisiana Supreme Court in this case defined the term 'breach of the peace' as 'to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.' 244 La. at 1105, 156 So.2d at 455. In Edwards, defendants had been convicted of a common-law crime similarly defined by the South Carolina Supreme Court. Both definitions would allow persons to be punished merely for peacefully expressing unpopular views."

379 U.S. at 551. The common-law crime of criminal libel was held unconstitutionally indefinite for the same reason in *Ashton v. Kentucky,* 384 U.S. 195 (1966).

In *Baggett v. Bullitt,* 377 U.S. 360 (1964), a loyalty oath was held invalid because it depended on a definition of "subversive person" so broad that it could be read to include one who has endorsed a Communist candidate for office or a lawyer who represented a Communist or a journalist who defended the constitutional rights of Communists. A similar definition of "subversive person" was at the heart of the Louisiana statutes struck down in *Dombrowski v. Pfister, supra.*

The ordinance held invalid in *Carmichael v. Allen,* 267 F.Supp. 985 (N.D.Ga. 1967), purported to make it a crime "to do anything tending to disturb the good order, morals, peace or dignity of the City." As the three-judge court quite correctly observed, at 998, this ordinance was broader even that the definition of breach of peace in the *Edwards* case.

This same vice, that the statute permits expression to be prohibited merely because someone does not like the content of what is being said, has been the test also in the censorship cases. The ordinance held un-

constitutional in *Gelling v. Texas,* 343 U.S. 960 (1952), prohibited showing of any movie "of such character as to be prejudicial to the best interests of the people of said city." In its most recent expression, in *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968), the Court said:

> "The term 'sexual promiscuity' is not there defined and was not interpreted in the state courts. It could extend, depending upon one's moral judgment, from the obvious to any sexual conducts outside a marital relationship."

Compare, on the other hand, those cases in which laws have been upheld against claims of vagueness. an ordinance prohibiting any "parade or procession upon any public street" without a license was held valid on its face since the state court had construed it as requiring that licenses be granted on a non-discriminatory basis and as allowing only considerations of time, place, and manner so as to serve the public convenience. *Cox v. New Hampshire,* 312 U.S. 569 (1941).

A New Hampshire statute coming under attack the following year provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name * * *." This, the Court said, was

> ". . . a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. * * * This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law."

Chaplinsky v. New Hampshire, 315 U.S. 568, 573-574 (1942).

In *Feiner v. New York,* 340 U.S. 315 (1951), this Court upheld a criminal conviction for violation of the following statute:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> 3. Congregates with others on a public street and refuses to move on when ordered by the police; * * *."

Federal and state statutes prohibiting "obscene or indecent" matter were upheld against a vagueness attack in *Roth v. United States,* 354 U.S. 476, 491 (1957), the Court saying:

> "The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere. Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process."

In *Cox v. Louisiana,* 379 U.S. 559, 562 (1965), the following statute was described as "a precise, narrowly drawn regulatory statute which proscribes certain specific behavior" and it was held valid on its face:

> "Whoever, with the intent of interfering with, obstructing, or impeding the administration of

> justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana * * *."

The Court recognized that "there is some lack of specificity in a word such as 'near'," *id.* at 568, but said:

> "This administrative discretion to construe the term 'near' concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse and is the type of narrow discretion which this Court has recognized as the proper role of responsible officials in making determinations concerning the time, place, duration, and manner of demonstrations. * * * It is not the type of unbridled discretion which would allow an official to pick and choose among expressions of view the ones he will permit to use the streets and other facilities * * *."

id. at 569.

An ordinance clearly invalid on its face was saved by the limiting construction it had been given by the state courts, in *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1965). The Court first discussed, at 90, the facial invalidity of the ordinance:

> "Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration."

It then discussed the construction put on the ordinance by the state courts and said, at 91:

> "The Alabama Court of Appeals has thus authoritatively ruled that § 1142 applies only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on. It is our duty,

of course, to accept this state judicial construction of the ordinance. * * * As so construed, we cannot say that the ordinance is unconstitutional though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied."

More recently, in *Adderley v. Florida,* 385 U.S. 39 (1966), the Court upheld a statute prohibiting "every trespass upon the property of another, committed with a malicious and mischievous intent." This Court distinguished the *Edwards* and *Cox* cases, on the ground that they had involved indefinite, loose, and broad charges. The statute before it was not invalid for vagueness or overbreadth, because "there is no lack of notice in this law, nothing to entrap or fool the unwary." *Id.* at 42.

On April 22nd of this year this Court upheld the definition of "obscenity harmful to minors" in a New York censorship statute since it was said to be virtually identical with the Court's own most recent statement of the elements of obscenity. Incorporation of this test in a statute was said to give "men in acting adequate notice of what is prohibited." *Ginsberg v. New York,* 390 U.S. 629 (1968).

On the same day, in a case of very great importance in deciding the present case, the Court upheld a Mississippi statute making it unlawful

> "... for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to or from any public premises * * * or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto."

This, the Court said, "clearly and precisely delineates its reach in words of common understanding." The Court also rejected the argument that the statute was overly broad. *Cameron v. Johnson,* 390 U.S. 611 (1968).

The following words and phrases are hardly models of precision, yet they have been held constitutionally valid in the cases just reviewed:

"congregate with others"

"interfering with, obstructive, or impeding"

"Mischievous intent"

"near"

"obscene or indecent".

"obstruct free passage"

"obstruct or unreasonably interfere"

"offensive, derisive or annoying"

"parade or procession"

"picketing or mass demonstrations"

It is plain that the Court does not require of the states that criminal statutes be drawn with the precision of the multiplication tables, and that, even when First Amendment freedoms are implicated, the states need not delineate the forbidden conduct by metes or bounds. A statute will be struck down for constitutional overbreadth only if on its face, or as construed by the state courts, it openly invites punishment for the expression of unpopular ideas. We again direct the attention of this Court to the fact that the arrests of the appellees were made by Federal Military Police, not for anything they had said, but because they had engaged in an affray with military personnel.

Other recent cases of inferior courts that have followed the above rationale in this interpretation of the

recent decisions of this Court are: *United States v. Woodard, et al.*, 376 F.2d 136 (7th Circuit, 1967); *Barber v. Kinsella,* 277 F.Supp. 72; *Wright v. City of Montgomery,* 282 F.Supp. 291 (1962); *Johnson v. Lee,* 281 F.Supp. 650 (1968).

To return to decisions of this Court, appellant relies finally on *Zwicker v. Boll,* 391 U.S. 353 (1968). The short *per curiam* opinion is of value only when read in conjunction with the Jurisdictional Statement and the Motion to Affirm. A fact situation, a statute and a constitutional attack similar in most respects to the instant case reveal that *Zwicker* is compelling authority for reversal of the instant case.

The Wisconsin Disorderly Conduct statute (Wis. Stats. § 947.01) states:

> "Wis. Stats. § 947.01. Disorderly Conduct—Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days: (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance."

A suit was filed alleging unconstitutionality under the First Amendment for both vagueness and overbreadth. The Three-Judge Federal Court held against the plaintiffs and appeal was taken to this Court, which affirmed the Trial Court.

When the facts of the instant case are applied to the rationale of the dissent in *Zwicker* by Mr. Justice Douglas it becomes apparent that the instant cause does not even fall within the dissent because there is no showing in the instant record of any harassment, bad faith, or discrimination.

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POINT 3 RESTATED

Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of overbreath?

The courts of the State of Texas have interpreted the Texas disturbing-the-peace statutes (Article 474 and its predecessors) and have limited by construction the purposes for which the statute may be employed.

In the early case of *Anderson v. State,* 20 S.W. 358 (1892), the Court said:

> "The Statute says loud and vociferous not loud or vociferous language. Webster defines 'vociferous' thus: 'Making a loud outcry; clamorous; noisy, as, vociferous heralds.' 'Vociferously:' 'With great noise in calling; shouting,' etc. Do the facts in this record show with reasonable certainty that appellant used loud and vociferous language? . . . This loud language, if it be such, was used in a house in which quite a number of persons were assembled, and it is passing strange that no witness could be found who could give us a criterion or fact by which we could determine whether the language was loud and vociferous or not. How could it have been loud when quite a number state they were present, and could not hear what was said? If vociferous, it could have been heard by all in the house at least. We are of the opinion that the evidence does not establish with reasonable certainty the fact that the appellant used loud and vociferous language in such manner as was calculated to disturb the persons assembled at the house; wherefore the judgment is reversed, and the cause remanded."

In the case of *Thomason v. State,* 265 S.W. 579 (1924) the Court said in relation to a complaint that defendant was guilty of using loud or vociferous lan-

guage that loud "when speaking of sound" is defined in the dictionary as "marked by intensity or relative intensity; not low, soft or subdued." "Vociferous" is defined as "making a loud outcry; clamorous; noisy," and is synonymous with brawling or turbulent. In this case, the Court reversed the conviction of the defendant, who was talking during a religious service in a church, as the complaining witness was not even able to distinguish the words said. For this reason it was held that the language could not have been in a loud and vociferous manner within the meaning of the statute. To like effect is *West v. State,* 97 S.W.2d 476 (1936).

By the above decisions, the Court of Criminal Appeals has limited the conviction for the use of "loud and vociferous language" to a course of conduct which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of the occupants of a private residence or persons in a public place. This interpretation by the Court of Criminal Appeals eliminates entirely under this Section of the Statute any offense based on the content of the words used and does not attempt to restrict the thoughts to be conveyed in violation of the First Amendment. It merely attempts to limit the manner in which the words are spoken.

The court below apparently has ignored these and other limiting Texas decisions and has instead substituted its own interpretations. Appellants urge that this is error. These interpretations of Texas law are binding on the Federal Courts in their consideration of the issues covered by such opinions. *Cox v. New Hampshire,* 312 U.S. 569; *Poulos v. New Hampshire,* 345 U.S. 395; *Shuttlesworth v. City of Birmingham,* 382 U.S. 87; *Cox v. Louisiana,* 379 U.S. 538.

POINT 4 RESTATED

Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 28 U.S.C., Section 2284(2)?

Section 2284 of Title 28 of the United States Code Annotated sets up the composition and procedure for a hearing by a three-judge federal court. Subdivision (2) states:

> "(2) If the action involves the enforcement, operation or execution of state statutes or state administrative orders, at least five days notice of the hearing shall be given to the Governor and Attorney General of the state."

No notice was given to the Governor of Texas.

In Cyclopedia of Federal Procedure, Third Edition, 1965 Revised Volume, in Volume 14a at page 342 in Section 73.107 under the heading Notice of Hearing the following appears:

> "If the action involves the enforcement operation or execution of a state statute or administrative order, at least five days' notice of the hearing shall be given to the governor and attorney general of the State. This notice is jurisdictional."

Cited as authority for the foregoing is *Crescent Manufacturing Company v. Wilson*, 242 F. 462. In the Crescent case at page 464 the following appears:

> "When application for the injunction was presented to the District Judge it was incumbent upon him to call to his assistance two other judges, one of whom should be a Justice of the Supreme Court or a Circuit Judge, to hear and determine the application. And it was also his duty to give notice of the hearing to the Governor and Attor-

ney General, as well as to such other persons as may be defendants in the suit."

Furthermore, in *Arneson v. Denny, et al.*, 25 F.2d 993 the question was raised even after certain notice had been given to both the Governor and the Attorney General of the State of Washington. There the Court held that not only must some notice be given but that the Governor should be informed of the particular law of the State of Washington, enforcement of which was sought to be enjoined, upon what grounds such law was claimed to be unconstitutional, and the time when the Defendants would be served with copies of the court's order, complaint, and motion. At Page 995 of the *Arneson* Opinion the following language appears:

> "It may be that the Attorney General has waived any defect in the notice, but the question remains as to the sufficiency of the notice served upon the Governor."

It seems altogether proper that the Congress should provide for notice to the Governor since an adverse ruling would affect law enforcement throughout the state and the Governor should be put on notice to take whatever steps are necessary to safeguard the lives and property of all people in the state. Since the Trial Court did not comply with this statute in the instant cause, Appellant urges that jurisdiction was lacking to enter the order and judgment of April 10, 1968.

WHEREFORE, premises considered, Appellant urges this Court to reverse the holding of the United States District Court for the Western District of Texas in the instant cause and to hold that Article 474, Texas Penal Code is valid and enforceable under the Constitution of the United States, particularly as construed and defined by the Texas courts or in the alternative to hold that the United States District Court

for the Western District of Texas had no jurisdiction of the instant cause because same had become moot or because no proper notice had been given to the Governor of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Appellants' Brief has been served on counsel for the Appellees by depositing same in the United States Mail, postage prepaid, addressed to Mr. Sam Houston Clinton, Jr., 308 West 11th, Austin, Texas 78701, this the —— day of ———, 1968.

HOWARD M. FENDER
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